(1)

Supreme Court, U.S.
FILED

021560 FEB 19 2003

NO.

IN THE SUPREME COURT OF THE UNITED STATES

SUBALECTHUMY VENGADASALAM,

Petitioner,

vs.

JOHN ASHCROFT, Attorney General and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

ON PETITION FOR CERTIORARI TO THE
UNITED STATES ELEVENTH CIRCUIT OF APPEALS

PETITION FOR CERTIORARI

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42 pp

STATEMENT OF ISSUES

1.) The issue of importance to this Court is the conflict between the Eleventh Circuit's panel decision and three of this Court's recent opinions and the conflict with the Courts of the 6th, 8th, and 9th Circuits of appeal. The present opinion of the Eleventh Circuit wholly deferred to the Board of Immigration Appeals opinion, to allow the **retroactive** application of Title 8 Section 1229b(d)(1) [the so-called "stop time" rule] of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA], contrary to the analysis and express prohibition in **Immigration and Naturalization Service v. St. Cyr**, ____ U.S. ___, 121 S.Ct. 2271, ____ L.Ed.2d ___ (2001)(Court should not defer to Immigration opinions and retroactive application of IIRIRA would be manifestly unjust and deny due process involving substantial rights); and **Landgraf v. USI Film Products**, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1993)(prohition against bills of attainder); **contra**, **also**, **Otarola v. INS**, 270 F.3d 1272 (9th Cir. 2001)(stop time rule not applicable where INS took frivolous appeal to apply new stop time rule; applying new rule would be denial of due process); **Guadalupe-Cruz v. INS**, 240 F.3d 1209 (9th Cir. 2001)(IIRIRA not effective when judge considered case therefore cause reversed to apply previous law to current facts); **see, also**, **Tang v. INS**, 223 F.3d 713 (8th Cir. 2000); **Arrozal v. INS**, 159 F.3d 429, 434, and n2 (9th Cir. 1998)(bar does not apply, where final order obtained prior to April 1, 1997): **see**, **also**, **Fieran v. Immigration and Naturalization Service**, 268 F.3d 340 (6th Cir. 2001)(contrary interpretation of IIRIRA to present 11th Circuit opinion); **Astrero v. Immigration and Naturalization Service**, 104 F.3d 264 (9th Cir. 1996)(contrary interpretation of IIRIRA to present 11th Circuit opinion).

2.) That the panel of the Eleventh Circuit is direct conflict with and contrary to the holding in **St. Cyr**, **supra**, that a retroactive application of the stop-time rule herein would be unconstitutional and a denial of fundamental due process and a violation of the rule against bills of attainder as defined in **Landsgraf v. USI Film Products**, 511 U.S. 244, 114 S.Ct. 1484, 128 L.Ed.2d (229) (1993).

3.) That the panel of the Eleventh Circuit is in conflict with other opinions of this Court, even in death penalty cases; and with other Circuit Courts, which hold that parties, including the Government, should be held to their failure to raise arguments below. **See**, **e.g.**, **Mohammed v. Ashcroft**, 261

F.3d 1244, at 1251 (llth Cir. 2001)(where a party has failed to "**squarely raise**" an argument in an immigration matter, the Court will not allow the argument); **Otarola v. INS**, 270 F.3d 1272, at 1275-1276 (9th Cir. 2001)(the shoe is on the other foot). In this cause the Board of Immigration Appeals (hereinafter BIA), reversed the trial court, holding that the Stop Time Rule of the IIRIRA, which was not **effective** until **April 1997**, was **retroactive** to the trial proceedings on **November 6, 1996**. The INS failed at anytime to argue before the BIA that the Stop Time Rule was **retroactive**, but instead argued only that the Stop Time Rule was **effective** at the time of the trial herein on **November 8, 1996**.

4.) Finally, under the express interpretation of **Immigraton and Naturalization Service v. Rios-Pineda**, 471 U.S. 444, 105 S.Ct. 2098, 85 L.Ed.2d 452 (l985), the rules **in effect** at the time of the immigration hearing on November 8, 1996 are the rules to be applied to the cause herein and **not** the provisions of the IIRIRA, which became effective in April l997. In **Rios-Pineda** this Court was harshly critical of the Respondent, who had pursued baseless appeals to obtain the required seven years residence for a waiver of deportation. **See, also, Otarola**, 270 F.3d at 1276 (frivolous appeal by INS). In the present cause, the Respondent, INS, commenced a frivolous appeal of the November 8, 1996 Immigration Court order, when on November 8, 1996 the IIRIRA was plainly not effective. Under the plain conflict with **Rios Pineda** and **Otarola** this Court should similarly accept jurisdiction herein and reverse the present llth Circuit opinion.

5.) This is an important case to the proper exercise of this Court's jurisdiction, because of the complete departure from this Court's opinion in **St. Cyr**, which is on all fours with the present conflicting Eleventh Circuit opinion. Moreover, the conflict with three other Circuits, which regularly address the application of immigration issues and the IIRIRA can only be resolved by this Court.

LIST OF PARTIES AND CORPORATE DISCLOSURE

The petitioner hereby certifies that the following are the parties and corporations in this litigation:

SUBALECTHUMY ("SUBA") VENGADASALAM, the Petitioner;

JOHN ASHCROFT, Attorney General of the United States;

IMMIGRATION AND NATURALIZATION SERVICE.

TABLE OF CONTENTS

SUBJECT	PAGE
STATEMENT OF ISSUES	ii
LIST OF PARTIES AND CORPORATE DISCLOSURE	iii
TABLE OF CITATIONS	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE COURSE OF PROCEEDINGS	4 - 7
REASONS FOR GRANTING THE WRIT	8 - 14
CONCLUSION	15
APPENDIX	17

TABLE OF CITATIONS

U.S. CASES — PAGE

Immigration and Naturalization Service V. Rios-Pineda, 471 U.S. 444, 105 S.Ct. 2098, 85 L.Ed.2d 452 (1985) ..... ii, iii, 13, 14, 16

Immigration and Naturalization Service v. St. Cyr, ___U.S.___, 121 S.Ct. 2271, ___L.Ed.2d___(2001) ..... i, ii, 8-15

Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1993) ..... i, ii, 8, 9, 11, 12, 15

U.S. CONSTITUTION

Amendment V U.S. Constitution 3, 10, 15

Article I, Section 9 U.S. Constitution 3, 8, 9, 10, 15

OTHER CASES

Arrozal v. INS, 159 F.3d 429 (9th Cir. 1998) ..... i, 8, 11

Astrero v. INS, 104 F.3d 340 (9th Cir. 1996) ..... .I, 11, 15

Fieran v. INS, 268 F.3d 340 (6th Cir. 2001) ..... I, 11, 8, 15

Guadalupe-Cruz v. INS, 240 F.3d 1209 (9th Cir. 2001) ..... I, 7. 8, 10, 13, 15

In re: N-J-B, Int.Dec. 3309 WL107593 (BIA 1997) 6

Mohammed v. Ashcroft, 261 F.3d 1244 (11th Cir. 2001) ii, 11

Otarola v. INS, 270 F.3d 1272 (9th Cir. 2001) .. i, ii, 10, 12, 15

Ram v. INS, 243 F.3d 510 (9th Cir. 2001) 7

Tang v. INS, 223 F.3d 713 (8th Cir. 2000) ..... i, 15

Tefel v. Reno, 180 F.3d 1286 (11th Cir. 1999) 7, 15

Statutes and Rules

Illegal Immigration Reform and Immigrant Responsibility, Act of 1996 (IIRIRA) ..... i, ii, 4, 6, 7, 10-13, 15-16

Title 8 Section 1229b(d)(1) (stop time rule) ..... i, ii, 4, 6-13, 15-16

OPINIONS BELOW

The opinion of the U.S. Eleventh Circuit Court was entered on August 19, 2002 and is contained the Appendix hereto at A1-A4.

The opinion of the Board of Immigration Appeals was entered on October 12, 2001. This opinion is reported in the official Board of Immigration Appeals reporter and is contained in the Appendix hereto at A6-A7.

The opinion of the Immigration Court was entered on November 6, 1996 and is not reported in a reporter, which the Petitioner is aware of and is contained in the Appendix hereto at A8-A18.

JURISDICTION

On August 19, 2002 a panel of the U.S. Eleventh Circuit Court issued its opinion herein affirming the Board of Immigration Appeals decision. A1-A4. On November 18, 2002 the U.S. Eleventh Circuit Court denied the Petition for Rehearing and Petition for Rehearing En Banc. A5.

This Court has conflict jurisdiction herein and upon the due process clause and the prohibition against bills of attainder of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause of the United States Constitution provides **inter alia** that: No person shall. . . be deprived of life liberty, or property without due process of law. . ."

Article I Section 9 of the United States Constitution provides specifically that, "No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF THE COURSE OF PROCEEDINGS

Your Petitioner lawfully entered the United States on April 3, 1989. On February 4, 1993 the INS filed an order to show cause why your Petitioner should not be deported under the transitions rules to the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).

On November 8, 1996, the Immigration Court in an extensive and well-reasoned opinion rejected the INS claim that the Petitioner should be deported and suspended her deportation ordering permanent status for your Petitioner.

The INS appealed to the Board of Immigration Appeals (BIA) arguing that the so-called "stop time rule" of the IIRIRA was effective prior to November 8, 1996 and therefore the Petitioner had not acquired the requisite time for suspension of deportation under the IIRIRA. The INS did not argue at anytime that the stop time rule was **retroactive** to the Petitioner.

On October 12, 2001, the BIA **reversed** the ruling of the Immigration Court, holding that the stop time rule was retroactive from April of 1997 to the proceedings before the Immigration Court six months earlier.

On August 19, 2002, the Eleventh Circuit Court's panel completely deferred to the BIA opinion of the stop time rule and affirmed the judgment of the BIA. This petition follows.

The opinion of the Immigration Court; the three one page Briefs of the INS on Appeal; the opinion of the BIA; and the opinion of the Eleventh Circuit are appended hereto.

The Immigration Court on **November 8, 1996** in her decision stated the essential facts relative to the status of your Petitioner:

> "The Respondent is a 45 year old married female, native and citizen of Malaysia, who last entered the United States on April 3, 1989. The U.S. Immigration and Naturalization Service issued an Order to Show Cause on February 4, 1993, charging the Respondent with deportability under Section 241(a)(1)(B) of the Immigration and Nationality Act. At the Master Calendar appearance, the Respondent through counsel acknowledged service of the Order to Show Cause, admitted all the allegations of fact and conceded the charge of deportability contained in the Order to Show Cause."
>
> A10.

Your Petitioner, who is now fifty years old and has been a resident of the United States for almost fourteen (14) years, submitted an application for suspension of deportation to the Immigration Court, together with extensive exhibits showing, among other things, her extensive community service. A13-A15. The INS did not oppose the Petitioner's Motion to Reopen and apply for suspension of deportation after her Master Calendar appearance. **See**, A34-A35.

The Immigration Court recited that your Petitioner had to show four (4) essential requirements in order to be granted a suspension of deportation: **a.)** that the Petitioner has been continuously present in the United States for a period of seven (7) years prior to the application for suspension of deportation; **b.)** that she has been a person of good moral character; **c.)** that her deportation would result in extreme hardship to herself, a U.S. citizen or lawful permanent spouse, parent or child; and **d.)** that she merits the relief requested as a matter of discretion. A10. The Immigration Court found that the INS did not dispute factors a. b, c, and d: that your Petitioner was a person of good moral character; that deportation would result in extreme hardship; that she was entitled to deportation as a matter of discretion; and that the Petitioner has been continuously present in the United States for more than seven

years prior to her application for suspension of deportation. **See**, A13-A16.

Instead, the only argument raised by the INS in the Immigration Court on **November 8, 1996** was that the Stop Time Rule and the IIRIRA was effective as of **November 8, 1996** and applicable to the Petitioner to stop the running of her seven years residency requirement as of the service of the Order to Show cause on February 4, 1993. **See**, A29; A32.

The Immigration Court rejected the INS position that the IIRIRA Stop Time Rule was applicable on November 8, 1996 reciting that the effective date of the statute was **April 1, 1997**. A11. The Immigration Court further noted that the Stop Time Rule was only applicable through a Notice to Appear or through an order to show cause order issued on or after **September 30, 1996**. A11-A12. The Immigration Court found that as a matter of fact, that the INS had failed to ever cause a Notice to Appear to issued here and that as reflected in Congressional intent in the Legislative history and face of the statute, Congress did not equate Notices to Appear with Orders to Show Cause. **See**, A11-A13.

Despite the obvious facts and effective date of the Stop Time Rule as determined by the Immigration Court, on December 2, 1996 the INS filed its appeal of the Court's order. A29-A33. In its Notice of Appeal, the INS contended that the Stop Time Rule was instead effective on **October 1, 1996** and that the Petitioner had not accumulated seven years residency as set forth in the Stop Time Rule and therefore the Petitioner was not eligible on **November 8, 1996** under the IIRIRA for suspension of her deportation. A29-A33.

In a three (3) page brief on appeal filed on April 3, 1997 the INS continued to claim that the Stop Time Rule and the IIRIRA were effective on **September 30, 1996** before the Immigration Court ruled on November 8, 1996 and that therefore the Petitioner was not eligible for suspension of deportation under the Stop Time Rule on November 8, 1996. A25-A28. The INS relied upon a **February 20, 1997** decision of the BIA in **In Re N-J-B** to support its claim. The INS also contended that the Immigration Court should have let the INS repaper this case and start all over again under the IIRIRA. Id.

Apparently not satisfied with the INS brief, the BIA asked for additional briefing from the INS on five (5) more occasions between March 9, 1998 and April 18, 2000. However, the INS only responded with a one (1) page

supplemental brief on March 11, 2000 and December 9, 1999. A19-A21; A22-A24. In its supplemental briefs the INS noted that the Petitioner was part of the class in **Tefel v. Reno**, 180 F.3d 1286 (llth Cir. 1999) and that the INS should have been able to "repaper" this case. Id. The INS failed to make any other relevant argument herein and failed to argue at anytime that the Stop Time Rule was **retroactive**. Id.

Despite the failure of the INS to argue that the Stop Time Rule was **retroactive**, on October 12, 2001, the BIA applied the Stop Time Rule **retroactively** to your Petitioner holding that under the IIRIRA Stop Time Rule, [which was effective on **April 1, 1997**], that the service of the show cause order on **February 4, 1993** stopped the time running for the Petitioner's claim to seven years residency and therefore the Petitioner was not eligible under the IIRIRA for suspension of deportation. A6-A7. In its ruling the BIA relied **inter alia** upon **Ram v. INS**, 243 F.3d 510 (9th Cir. 2001), which was decided on February 8, 2001. However, the BIA also noted the **contrary** authority in **Guadalupe-Cruz v. INS**, 240 F.3d 1209 (9th Cir. 2001), decided a month later. Both decisions were issued before, **Immigration and Naturalization Service v. St. Cyr**, ___ U.S.___, 121 S.Ct. 2271, ___L.ED.2d___ (2001) (June 25, 2001).

For the first time on appeal before the Eleventh Circuit, the INS finally got a clue and argued that the stop time rule was in fact retroactive from April 1997 to the proceeding before the Immigration Court. A3-A4. The Eleventh Circuit decision, while reciting each of your Petitioner's arguments, but not discussing them, **completely deferred** to the INS interpretation that the stop time Rule was retroactive. The Eleventh Circuit reasoned that Congress had not clearly indicated otherwise and cited **inter alia**, the panel decision in **Tefel v. Reno**, **supra**. The Eleventh Circuit failed at anytime to discuss or distinguish the contrary ruling in **St. Cyr**, **supra**. The Eleventh Circuit also did not discuss nor distinguish the default of the INS in failing to make the argument at anytime below, that the stop time rule was retroactive. Id.

REASONS FOR GRANTING THE WRIT

A.)

This Court should determine that under the direct rule and intent of **Immigration and Naturalization Service v. St. Cyr, supra**, the BIA was incorrect in applying the Stop Time Rule retroactively to the parties' proceeding, which was five (5) years earlier on November 8, 1996, particularly where the INS failed at anytime to argue anywhere that the Stop Time Rule was **retroactive**. The BIA decision herein notes that **Guadalupe-Cruz v. INS, supra**, is contrary authority to the BIA overruling the Immigration Court herein. In **Guadalupe-Cruz**, four (4) days before the effective date of the Stop Time Rule, April 1, 1997, the Immigration Court had nevertheless applied the Stop Time Rule to deny relief from deportation. 240 F.3d at 1211. The BIA dismissed the petitioners' appeal. In reversing the denial of relief, the **Guadalupe-Cruz** Court ordered the Immigration Court to consider relief from deportation under pre-IIRIRA law, because to do otherwise would amount to a denial of due process:

> "The stop-time rule cannot be applied to [the petitioner] because he must receive a hearing under the law that applied to him at the time his original hearing occurred. Any other remedy would be inconsistent with the due process afforded to aliens in deportation proceedings."
>
> 240 F.3d at 1212.

See, also, Otarola, supra (stop time rule is not applicable where INS took a frivolous appeal in order to apply stop time rule, when it became effective; to apply new stop time rule would be a denial of due process); **Arrozal v. INS, supra** (stop time bar does not apply, where final order obtained prior to April 1, 1997 effective date of IIRIRA); **Fieran v. INS** (contrary interpretation to present llth Circuit opinion); **Astrero v. INS, supra**,(contrary interpretation to present llth Circuit opinion).

Furthermore, in **St. Cyr** the Court relying upon principals explained in **Landsgraf v. USI Film products**, 511 U.S. 244, 114 S.Ct.1483, 128 L.Ed.2d 229 (l994), also sustained the lower court finding that the AEDPA within the IIRIRA may not be retroactively applied to rights and circumstances, which have already accrued. In **Landsgraf v. USI Film Products** the Court also recites the principals applicable herein, which prohibit retroactive application of the Stop Time Rule on appeal:

> "As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingl; settled expectations should not be lightly disrupted. For that reason, the "principal that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal. In a free, dynamic society creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." [citations omitted].
>
> 114 S.Ct. at 1497.

The **Landsgraf** Court further explained the applicable constitutional principals herein:

> "The prohibition on "Bills of Attainder" in Art. I Sections 9-10 prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retro-active application." [citations omitted].
>
> **Id.**

In **St. Cyr** the United States Supreme Court specifically chided the INS for its obtuse position that aliens were not "disfavored persons" within the meaning and intent of the constitutional prohibition against Bills of Attainder. 121 S.Ct. at 2287, note 39 and text. Furthermore, the **St. Cyr** court specifically declined to defer to the INS interpretation of the IIRIRA and its retroactivity.

In the present cause, in direct conflict with the express analysis in **St. Cyr**, the Eleventh Circuit deferred **wholly** to the INS interpretation of the IIRIRA and its retroactivity. This was fundamentally erroneous and in direct conflict with the position and analysis the Eleventh Circuit should have maintained under **St. Cyr**.

Furthermore, the retroactive application on appeal of the Stop Time Rule in the IIRIRA by the BIA and the Eleventh Circuit is unconstitutional and unfair to your Petitioner within the specific meaning and intent of **Landsgraf**; and **St. Cyr**. The application of the Stop Time Rule five (5) years after the trial proceedings before the Immigration Court, where nobody raised the **retroactivity** of the Stop Time Rule, manifestly upsets expectations based upon law at the time of the conduct; and impairs substantial rights of your Petitioner when she acted, increasing her liability for past conduct and imposes new duties to transactions already completed. Furthermore, the application of the Stop Time Rule herein is a prohibited Bill of Attainder, in that it seeks to punish "disfavored persons." **See**, **St. Cyr**, 121 S.Ct. at 2287, n39 and text.

Under the circumstances of this case and upon **St. Cyr**, this Court should therefore take jurisdiction of this matter and overrule the Eleventh Circuit decision and reverse the judgment of the BIA and order that the Immigration Court judgment on November 8, 1996 be reinstated.

The retroactive application on appeal of the IIRIRA to your Petitioner herein and the gross adverse affect upon her family of such an action after thirteen (13) years of residency is fundamentally unfair; greatly harmful to the Petitioner and equally manifestly contrary to **St. Cyr**. **See** 121 S.Ct. 2292 ("**the potential for unfairness in the retroactive application of IIRIRA to people like [the petitioners] is significant and manifest**"); **see, also, Otarola v. INS; Guadalupe-Cruz v. INS, supra**. The present cause is a case without any difference to the intent and rule prohibiting retroactive application of the IIRIRA as recited in **St. Cyr**. It would be equally as inappropriate herein to apply the IIRIRA retroactively to your Petitioner on appeal after reliance upon the manifestly correct application of the law on **November 8, 1996** by the Immigration Court upon conduct and facts and circumstances, which had already taken place. **See**, 121 S.Ct. at 2288 ("**the principal that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal**").

Under **St. Cyr** and the foregoing authority in the present circumstance this Court should therefore accept jurisdiction herein and vacate the Eleventh Circuit decision herein with directions to reinstate the opinion of the Immigration Court allowing deportation to be suspended and your Petitioner allowed permanent resident status.

B.)

In the present cause, the INS failed at any time to make the argument before the trial court or BIA that the Stop Time Rule should be **retroactively** applied to deny the suspension of deportation application. **See**, A25-A28; A29-A31; A32-A36; A38-A43. In the proceedings below, the INS variously maintained that the Immigration Court was incorrect in refusing to apply the Stop Time Rule in the IIRIRA, **first** because the Stop Time Rule was effective on **October 1, 1996** and **then**, because the Stop Time Rule was effective on **September 30, 1996**. **Id**. The INS reasoned that therefore the Stop Time Rule should have been applied by the Immigration Court when it ruled on **November 8, 1996**.

Before the BIA the INS position was therefore plainly erroneous. **See e.g., Astrero v. INS**, 104 f.3D 264 (9th Cir. 1996). Despite the best efforts of the BIA to allow the INS to change this argument, it failed or neglected to correct this omission.

In **Mohammed v. Ashcroft**, 261 F.3d 1244, at 1251 (llth Cir. 2001) as in the case at bar, the petitioner had attempted to raise an argument for reversal, which he had, "not squarely argue[d]." In its opinion the **Mohammed** court disallowed the argument for reversal because the petitioner had "not squarely argued" the point. **Id.** In the present case, the INS maintained a position that the Stop Time Rule was already effective, and had never raised the argument that the Stop Time Rule should be **retroactively** applied from an effective date of April 1, 1997. This is certainly even less than the "not squarely argued" standard for waiver in **Mohammed**. Under **Mohammed** and a legion of cases like it in all Circuits, the INS took a frivolous position and did not even raise the argument for reversal, which prevailed in the BIA: that after the effective date, April 1, 1997 the Stop Time Rule applied to deny your Petitioner relief from deportation. The panel decision of the Eleventh Circuit was therefore in complete conflict with and failed to follow the elemental rule as exemplified by **Mohammed** that the failure to raise an argument, waives that argument. The BIA was therefore incorrect in saving the bacon for the INS by

applying the Stop Time Rule retroactively, when the INS did not ever even raise the **retroactive** application of the Stop Time Rule under the proper effective date. The panel decision should therefore be reversed with directions to reinstate the judgment of the Immigration Court, because surely the substantive law applies to the INS too. **Compare**, **Otarola v. INS**, 270 F.3d at 1275-1276 ("the shoe is on the other foot. . .").

C.)

The Eleventh Circuit failed adhere to the ample authority demonstrating Congressional intent herein as exemplified by this Court's analysis in **St. Cyr** and the Immigration Court decision below, and therefore the panel was incorrect in deferring to the BIA interpretation of the IIRIRA. In its analysis herein the Immigration Court specifically found that Congress did not manifest an intent to equate Orders to Show Cause such as that served upon your Petitioner nor did Congress intend to equate Orders to Show Cause with Notices to Appear as defined and implemented in the IIRIRA:

> "In the Joint Explanatory Statement of the Committee of Conference in Conference Report on HR2202" (Tuesday, September 24, 1996), the Conference Committee stated, "the rules under new Section 240A(d)(1)(2) regarding continuous physical presence in the United States as a criterion for eligibility for cancellation of removal shall apply to any Notice to Appear (including an Order to Show Cause under current Section 242(a)) issued after the date of enactment of the Act." Conference Report at 194-195. Thus it appears that Congress expected this provision to apply only to Orders to Show Cause issued after the date of enactment (otherwise stated, to those Orders to Show Cause issued after September 30, 1996). Thus it does not appear that Congress intended this provision to apply to the case at bar."
>
> "Also looking to the full text of the provisions regarding the effective date of the IIRIRA, it does not appear that Congress intended the term "Notices to Appear" to be construed as synonymous with an Order to Show Cause. In Section 309(c)(2), Congress provided that if the

> Attorney General elects to treat a deportation or exclusion proceeding as a removal proceeding, "the Notice of Hearing provided to the alien under Section 235 or 242(a) of such Act shall be valid as if provided under Section 239 of such Act." Thus Congress did itself use the term "Notice to Appear" and "Order to Show Cause" interchangeably and provided for an Order to Show Cause to be treated as a Notice of Hearing only after notice to the alien "not later than 30 days before the date any evidentiary hearing is commenced." If Congress did treat these charging documents interchangeably, the Court will decline to do so."
>
> A11-A12.

Finally, as noted above the Court found that the INS had failed to issued a Notice to Appear at any time herein. A11.

It cannot be gainsaid that the Immigration Court relying upon the plain language used by Congress on the face of IIRIRA would seem to be a reliable indication of Congressional intent. Moreover, the Immigration Court's relied upon a **Joint** Committee Report of Congress as an indicator of Congressional intent.

In the present circumstance the factual findings by the Immigration Court as to the lack of any Notice to Appear herein and that the Order to Show Cause served upon your Petitioner on February 4, 1993 was not equivalent to a Notice to Appear under the IRRIRA are unchallenged by the INS herein. Under the foregoing analysis the Eleventh Circuit Court should have ordered the findings of the Immigration Court reinstated.

C.)

Finally, in **INS v. Rios-Pineda**, 471 U.S. 444, 105 S.Ct. 2098, 85 L.Ed.2d 452 (1985), this Court specifically held that the Respondent, Rios-Pineda, could not stall the proceedings with frivolous appeals, because the law and facts at the time of the trial proceeding, were those to be applied to the case. In the same manner herein, the law and facts to be applied to this cause were those which the Immigration Court correctly applied and in existence on **November 8, 1996**. The INS instead commenced a frivolous appeal and five years later the

BIA unconstitutionally applied the IIRIRA, after it became effective, **retroactively** to the facts and circumstances of this case. This was plain error and manifestly conflicts with the rule and analysis in **Rios-Pineda**.

CONCLUSION

A.) The retroactive application of the Stop Time Rule on appeal by the BIA and the Eleventh Circuit is unconstitutional and unfair to your Petitioner within the meaning and intent of **St. Cyr** and **Landsgraf** and their predecessors and progeny. The retroactive application of the Stop Time Rule for the first time on appeal violates fundamental due process and the constitutional prohibition against employing Bills of Attainder. This Court should therefore accept jurisdiction herein and reverse the judgment of the panel and BIA and direct that the judgment of the Immigration Court on November 8, 1996 be reinstated.

B.) The Eleventh Circuit herein relys upon the previous holding of the Eleventh Circuit in **Tefel v. Reno, supra** that the provisions of the IIRIRA are retroactive. The panel decision and **Tefel v. Reno** cannot be resolved with the contrary ruling in **Immigration and Naturalization Service v. St. Cyr**, which held that the ADEPA provisions of the IIRIRA could not stand up to the constitutional barriers to retroactive application. **See, also, Otarola; Guadalupe-Cruz; Tang v. INS; Fieran; Astrero, supra**. In this cause the manifest unfairness and the clear reliance and settled expectations of the Petitioner and her substantive rights under **St. Cyr, supra**, cannot be runover by the retroactive application of the Stop Time Rule for the first time on appeal five (5) years after those expectations and rights were established and determined.

C.) The Eleventh Circuit failed to properly consider that the INS position in the Immigration Court, that the Stop Time Rule was effective on **October 1, 1996**, was plainly **erroneous** and that the INS position on appeal before the Board of Immigration Appeals, that the Stop Time Rule was effective on **September 30, 1996** was **frivolous**. The Eleventh Circuit therefore is in direct conflict with decisions like **Otarola v. INS**, wherein a default by the INS should be enforced just like any other party.

D.) The Eleventh Circuit failed in its duty to hold that the INS failed at anytime to "squarely" or even fairly present a claim in the trial court or before the BIA that the Stop Time Rule should be **retroactively** applied. Under well settled precedent, the INS like any litigant should be bound by its arguments and failure to present issues at the trial and appellate levels.

E.) The Eleventh Circuit herein failed to address that the Immigration Court in a well-reasoned and carefully researched opinion correctly concluded that Congress had indeed spoken in enacting the IIRIRA and did not equate Orders to Show Cause with Notices of to Appear. The Eleventh Circuit failed to consider that the Immigration Court further held that as matter of fact and law that the Order to Show Cause served upon your Petitioner on February 4, 1993, was not the equivalent of a Notice to Appear invoking the Stop Time Rule and in finding as matter of fact and law that the INS failed at all times material hereto to file any Notice to Appear.

F.) Finally, under the express reasoning of this Court in **Rios-Pineda**, the Eleventh Circuit failed to apply the law and facts at the time of the hearing on **November 8, 1996**, and this Court should grant certiorari upon the plain conflict with the analyis and rule in **Rios-Pineda**.

WHEREFORE, and upon the foregoing and such other terms as this Court deems just, your Petitioner, SUBALECTHUMY VENGADASALAM, prays that this Honorable Court will grant Certiorari and that this Court upon consideration of the merits herein, will reverse the Eleventh Circuit and the order of the Board of Immigration Appeals and reinstate the judgmenmt of the Immgration Court entered on November 8, 1996 allowing your Petitioner to remain in this country after almost fourteen (14) years as an exemplary "citizen" of her community.

RESPECTFULLY SUBMITTED, on this 17th day of February 2003 at Fort Lauderdale, Broward County, Florida.

SUBALECTHUMY VENGADASALAM
2134 Lincoln Street, Apt. 1
Hollywood, Florida 33020
(954) 298-6355

_____

SUBALECTHUMY VENGADASALAM
Pro se

APPENDIX

PAGE

U.S. 11TH CIRCUIT PANEL DECISION A1-A4

ORDER DENYING REHEARING AND REHEARING EN BANC A5

BOARD OF IMMIGRATION APPEALS DECISION A6-A7

IMMIGRATION COURT DECISION A8-A18

INS BRIEF 3-2-2000 ..... A19-A21

INS BRIEF 12-9-99 ..... A22-A24

INS BRIEF 4-3-97 ..... A25-A28

INS NOTICE OF APPEAL 12-2-96 ..... A29-A33

TRIAL COURT DECISION TO REOPEN A34-A35

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-16384
Non-Argument Calendar

IN No. A72-031-574

SUBALECTHUMY VENGADASALAM,

Petitioner,

versus

UNITED STATES ATTORNEY GENERAL, IMMIGRATION AND NATURALIZATION SERVICE, et.al.,

Respondents.

Appeal from a Final Decision of
the Board of Immigration Appeals

(August 19, 2002)

Before TJOFLAT, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Subalecthumy Vengadasalam, *pro se*, petitions this court for review of the Board of Immigration Appeals' ("BIA's") order vacating the immigration judge's ("IJ's") order awarding suspension of deportation and granting voluntary departure with an alternate order of deportation to Malaysia. After reviewing the record, we deny the petition.

I. JURISDICTION

Because Vengadasalam's final order of deportation was entered more than thirty days after September 30, 1996, and her administrative proceedings were commenced before April 1, 1997, the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA"), apply. Under the transitional rules, our jurisdiction is governed by former INA § 106, 8 U.S.C. § 1105a, unless any of IIRIRA's transitional provisions are triggered. *See* IIRIRA § 309(c)(1) & (4); *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1276-77 (11th Cir. 2001).

Section 309(c)(4)(E) of the transitional rules provides that "there shall be no appeal of any discretionary decision under section . . . 244 . . . of the Immigration and Nationality Act [("INA")] (as in effect as of the date of the enactment of this Act [Sept. 30, 1996])." IIRIRA § 309(c)(4)(E). This provision, however, does not preclude review here because Vedngadasalam ultimately was denied relief under INA § 244 based upon her failure to meet the "continuous physical presence" required in that provision, which is a non-discretionary factor. *See Al Najjar*, 257 F.3d at 1298.

Vengadasalam newly argues that this court should vacate the BIA's final order because the INS' position that the stop-time rule in INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1), was effective before April 1, 1997, was frivolous when the appeal was filed. We review *de nonva* issues of subject-matter jurisdiction. *See Tefel v. Reno*, 180 F.3d 1286, 1295 (11th Cir. 1999). Former INA § 106(c), 8 U.S.C. § 1105a(c) (1996), which applies to cases governed by the transitional rules, *see* IIRIRA § 309(c)(4)(A), provides that there is no review of a claim "if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations." *Al Najjar*, 257 F.3d at 1283 n.12 (citations omitted). The exhaustion requirement in § 1105a(c) is jurisdictional. *See Garcia-Mir v. Smith*, 766 F.2d 1478, 1488-89 (11th Cir. 1985). Because Vengadasalam did not present this claim to the BIA, we lack jurisdiction to consider it.

II. DISCUSSION

Vengadasalam argues that the BIA's application of the stop-time rule in INA § 240A(d)(1) to her application for suspension of deportation was erroneous. She adopts her arguments in her brief presented in 2000 to the BIA that (1) the continuous-presence period may accrue after issuance of the order to show cause ("OSC"); (2) IIRIRA § 309(c)(5) does not apply to cases governed by pre-IIRIRA law; and (3) the language of INA § 240A(d)(1) shows that only a notice to appear ("NTA") may interrupt continuous presence. Vengadasalam avers that the INS never argued to the BIA that the stop-time rule should apply retroactively, and that the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), mandates reversal of the BIA's decision because applying the stop-time rule to her case would have an impermissible retroactive effect. Vengadasalam argues that the application of INA § 240A(d)(1) to her case is a violation of due process and constitutes an impermissible Bill of Attainder.

A factual determination by the BIA that an alien is statutorily barred for relief from deportation is reviewed under the substantial evidence test. *See Al Najjar*, 257 F.3d at 1283-84. This court must affirm the BIA's decision if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Id.* At 1284 (citations omitted). We consider the BIA's interpretation of applicable statutes *de novo*. *Id.* Nonetheless, if Congress has not spoken clearly on an issue, the interpretation of the statute by the agency which administers it is entitled to deference where it is reasonable, particularly in the field of immigration. *See Mazariegos v. Attorney General*, 241 F.3d 1320, 1327 n.4 (11th Cir. 2001) (citing *Chevron U.S.A., Inc. V. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)); *see also Al Najjar*, 257 F.3d at 1284, 1300.

Section 244 of the former INA rendered aliens eligible for suspension of deportation if, among other things, they established continuous physical presence in the United States for seven years before applying for suspension. *See* 8 U.S.C. § 1254(a)(1) (1996). IIRIRA was enacted on September 30, 1996, and given an effective date of April 1, 1997. *See* IIRIRA § 309(a); *Anin v. Reno*, 188 F.3d 1273, 1275 n.2 (11th Cir. 1999). IIRIRA § 308(b)(7) repealed the suspension statute, and IIRIRA § 304(a) placed a more limited form of suspension relief in INA § 240A, 8 U.S.C. § 1229b, referred to as "cancellation for removal." IIRIRA also changed the terminology for the written notice initiating deportation proceedings from an OSC to an NTA. *See* IIRIRA § 308(b)(6); former INA § 242B(a)(1), 8 U.S.C.

§ 1252b(a)(1) (1996); INA § 239(a), 8 U.S.C. § 1229a (1997). Section 240A(d)(1) of the new INA, "the stop-time rule," provides that "continuous physical presence in the United States shall be deemed to end when the alien is served [an NTA] . . . " INA § 240A(d)(1).

As originally enacted and at the time of Vengadasalam's proceedings before the IJ, section 309(c)(5) of the transitional rules applied INA § 240A(d)(1) to *notices to appear* issued before, on, or after the date of the enactment of IIRIRA. *See Tefel*, 180 F.3d at 1290 n.4 & 1293. As mentioned earlier, through, NTAs were not used in deportation proceedings before IIRIRA's enactment. The Nicaraguan and Central American Relief Act ("NACARA"), Pub.L.No. 105-100, 111 Stat. 2160 (1997), enacted while the INS' appeal to the BIA was pending, amended IIRIRA § 309(c)(5) by clarifying that the stop-time rule "shall apply to *orders to show cause* . . . issued before, on, or after the date of the enactment of this Act." *See* NACARA § 203(a)(1) (emphasis added). This change became effective as if originally included in IIRIRA. *See* NACARA § 203(f).

We have construed NACARA's amendment to IIRIRA § 309(c)(5) to (1) clarify that the stop-time provision applies to aliens who were facing deportation and/or had applied for suspension of deportation before IIRIRA's enactment; and (2) preclude any argument that the referenced to NTAs in the stop-time rule suggested that Congress intended the rule to apply only to post-IIRIRA removal proceedings initiated by NTAs. *See Tefel*, 180 F.3d at 1293, 1302; *see also Al Najjar*, 257 F.3d at 1299.

After reviewing the record, we conclude that the BIA properly determined that Vengadasalam was ineligible for suspension of deportation. Therefore, we hereby deny the petition for review.

PETITION DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16384-DD

SUBALECTHUMY VENGADASALAM,
Petitioner,

versus

UNITED STATES ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION SERVICE,
ROBERT A. WALLIS, DANIEL VERA,
MARY M. DUNNE, GERALD S. HURWITZ,
KEVIN A. OHLSON,
Respondents.

On Petition for Review from the
Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ____F.2d_____).

Before: TJOFLAT, BIRCH, and DUBINA, Circuit Judges.

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

ORD-42 (6/95)

US Department of Justice
Division of Board of Immigration Appeals
Executive office for Immigration review

Falls Church, Virginia 22041

File: A72 031 574 - Miami

In re: SUBALECTHUMY VENGADASALAM

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Clark Trainor, Esq.

ON BEHALF OF SERVICE:
David Landau
Assistant District Counsel

CHARGE:
Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - In the United States in violation of law

APPLICATION:
Reinstatement of proceedings

ORDER:

PER CURIAM. The Immigration and Naturalization Service ("Service") appeals the November 8, 1996, decision of an Immigration Judge granting the respondent's application for suspension of deportation under section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a). The Service correctly argues that the Immigration Judge erred in finding that the respondent had met the continuous physical presence requirements for suspension of deportation. For purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends upon the service of the Order to show Cause and Notice of hearing (Form I-221) on the alien, irrespective of the date that it was issued. *See Ram v. INS*, 243 F.3d 510 (9th Cir. 2001); *Matter of Nolasco*, Interim Decision 3385 (BIA 1999); *but see Guadalupe-Cruz v. INS*, 240 F.3d 1209 (9th Cir. Feb. 27, 2001), *as*

corrected by Guadalupe-Cruz v. INS, 250 F.3d 1271 (9th Cir. March 15, 2001).

In the present case, the record reflects that the respondent, a native and citizen of Malaysia, last entered the United States on or about April 3, 1989 (Tr. At 9-10; Exh. 1). The Order to Show Cause and Notice of Hearing (Form I-221) was served on the respondent on February 4, 1993, before she had acquired 7 years of continuous physical presence in this country. The respondent is thus unable to satisfy the statutory physical presence requirement now in effect and accordingly has failed to meet her burden of establishing prima facie eligibility for suspension of deportation. *See Ram v. INS, supra.*

Accordingly, we find that the respondent is statutorily ineligible for suspension of deportation. The Service's appeal is sustained, and the Immigration Judge's decision granting the respondent suspension of deportation is vacated.

On the basis of the record now before us, it does not appear that the respondent has been convicted of any criminal offense, nor do we find an adequate basis to support a finding that she lacks good moral character (Tr. At 45). As it appears that she is willing and has the means with which to depart voluntarily (Tr. At 44-45), we will grant the respondent this minimal relief from deportation.

FURTHER ORDER: In accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be ordered deported to the country of Malaysia.

KEVIN A. O_____ (illegible)
FOR THE BOARD

---

[1] Although the Order to Show Cause (Form I-221) reflects the respondent's name as Vengadasalam Subalecthumy, based upon the respondent's testimony the record was corrected to reflect that the respondent's name is Subalecthumy and her surname is Vengadasalam (Tr. At 25-26, 59-60).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

IN THE MATTER OF:

Date: November 8, 1996
Case No. 73 031 574

SUBALECTHUMY VENGADASALAM)
Respondent)

N DEPORTATION PROCEEDINGS)

MEMORANDUM OF ORAL DECISION

This is a summary of an oral decision entered in the above captioned matter on November 8, 1996. If the decision is appealed the full text of the oral decision will be transcribed and will become the official decision in these proceedings.

_X_ Respondent has been found to be subject to deportation under Section 241(a)(1)(B) of the Immigration and Nationality Act of 1952, as amended.

_____ Respondent(s) was (were) order deported to ____ or _____.

_____ Respondent(s) was (were) granted voluntary departure on or before _____ with an alternate order of deportation to _____ _____.

_X_ Respondent was granted relief under Section 244(a)(1) of the Immigration and Nationality Act of 1952, as amended.

_____ Respondent was denied relief under Section _____ of the Immigration and Nationality Act of 1952, as amended.

_X_ The proceedings were terminated.

_____ Respondent(s) was (were) granted a waiver under Section _____ of the Immigration and Nationality Act of 1952, as amended, and the proceedings were terminated.

_____ Respondent(s) has (have) reserved appeal. Any appeal is due on or before _____.

X The Immigration and Naturalization Service has reserved appeal. Any is due on or before December 9, 1996.

_____ All parties have waived appeal; final order.

X Other: Respondent's status adjusted to lawful permanent resident.

DENISE NOONAN SLAVIN
U.S. Immigration Judge

cc: District Counsel
Counsel for Respondent(s)
Respondent(s)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

File No.: A 72 031 574 November 8, 1996

In the Matter of

SUBALECTHUMY VENGADASALAM)
Respondent)

IN DEPORTATION PROCEEDINGS)

CHARGE: Section 241(a)(1)(B) of the Immigration and Nationality Act - entry as a visitor and remaining for a longer time than permitted.

APPLICATIONS: Suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act; voluntary departure pursuant to Section 244(e) of the Immigration and Nationality Act.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 45-year-old married female, native and citizen of Malaysia, who last entered the United states on April 3, 1989. The U.S. Immigration and Naturalization Service issued an Order to Show Cause on February 4, 1993, charging the respondent with deportability under Section 241(A)(1)(B) of the Immigration and Nationality Act. At the Master Calendar appearance, the respondent, through counsel, acknowledged service of the Order to Show Cause, admitted all the allegations of fact and conceded the charge of deportability contained in the Order to Show Cause. Based upon these admissions, deportability has been established by clear, unequivocal and convincing evidence. See Woodby v. INS, 385 U.S. 276 (1966); 8 C.F.R. Section 242.14(A).

The respondent has submitted an application for suspension of deportation on EOIR Form 40. See Exhibit 3. She has also submitted various documents attached to that application and has supplemental exhibits. See Exhibits 3 and 4. In order to establish eligibility for suspension of deportation under Section 244(A)(1) of the Act, an alien must establish the four statutory requirements of said section: that she has been physically present in the United States for a continuous period of at least seven years; that she has been a person of good

moral character during that time; that her deportation would result in extreme hardship to herself or to a U.S. citizen or lawful, permanent resident spouse, parent or child; and that the respondent merits the relief as a matter of discretion.

The Immigration and Naturalization Service has moved to pretermit the respondent's application for suspension of deportation under Section 240(A)(d)(1) of the Immigration and Nationality Act of 1952, as amended by Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The motion is denied.

Under Section 240(A)(d)(1), as amended, any period of continuous physical presence in the United States "shall be deemed to end when the alien is served a Notice to Appear under Section 239(A)." This provision refers to new Section 240(A)(b) of the Act, which deals with "cancellation of removal proceedings" and which will supersede the relief of suspension of deportation currently available under Section 244(A)(1) of the Act. The respondent has not been in the United States for seven years prior to the service of the Order to Show cause. While, in general, the effective date for the subtitle of the IIRIRA containing this provision does not take effect until April 1, 1997, Section 240(A)(d)(1) "shall apply to Notices to Appear issued before or after the date of enactment of the Act." See Section 309(c)(5). The IIRIRA was enacted on September 30, 1996.

To determine if Section 240(A)(d)(1) should apply to the case at bar, one should first look to the plain language of the statute. See INS v. Phinpathya, 464 U.S. 183 (1984). The Act states that this Section is applicable to "Notices to Appear" issued on, before or after the enactment of the Act. The term "Notices to Appear" is a term of art under the IIRIRA, as defined in Section 239. See Section 304 of the IIRIRA. Simply stated, it is the charging document to initiate removal proceedings under the IIRIRA. A Notice to Appear has not been issued in the instant case. The charging document in the case at bar, a deportation proceeding, was an Order to Show cause under Section 242 of the Immigration and Nationality Act of 1952, previous to the amendment by the IIRIRA.

Further, even if it were argued that the language of the statute was unclear, the Court would then turn to the legislative history to determine the intent of Congress. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). In the "Joint Explanatory Statement of the Committee of Conference in Conference Report on H.R. 2002" (Tuesday, September 24, 1996), the Conference Committee stated "the rules under new Section 240(A)(d)(1) and (2) regarding continuous physical presence in the United States as a criterion for eligibility for cancellation of removal shall apply to any Notice to Appear

(including an Order to Show Cause under current Section 242(a)) issued after the date of enactment of the Act." Conference Report at 194-195. Thus, it appears that Congress expected this provision to apply only to Orders to Show Cause issued after the date of enactment (otherwise stated, to those Orders to Show Cause issued after September 30, 1996). Thus, it does not appear that Congress intended this provision to apply to the case at bar.

Also, looking to the full text of the provisions regarding the effective date of the IIRIRA, it does not appear that Congress intended the term "Notices to Appear" to be construed as synonymous with an Order to Show Cause. In Section 309(c)(2), Congress provided that if the Attorney General elects to treat a deportation or exclusion proceeding as a removal proceeding, "the notice of hearing provided to the alien under Section 235 or 242(a) of such Act shall be valid as if provided under Section 239 of such Act." Thus, Congress did not itself use the terms "Notice to Appear" and "Order to Show Cause" interchangeably and provided for an Order to Show Cause to be treated as a notice of hearing only after notice to the alien "not later than 30 days before the date any evidentiary hearing is commenced." If Congress did not treat these charging documents interchangeably, the Court will decline to do so. Further, whereas here, "Congress included particular language in one Section of the Statute, but omits it in another Section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or inclusion." See INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

The Immigration and Naturalization Service has argued that since the language in a parenthetical provision refers to Notices to Appear issued before the effective date of the Act, this must be referring to Orders to Show Cause since a Notice to Appear as defined under the IIRIRA could not have been issued prior to the Act. However, again referring to the full text of this provision, there is a situation in which an Order to Show Cause would be taken as a Notice to Appear. That is when the election has been made under Section 309(c)(2). In that case, an Order to Show Cause would become a Notice to Appear and it would be issued before the effective date of the Act. In those cases, the issuance of the Order to Show Cause will be deemed to terminate the continuous physical presence requirement.

Finally deportation statutes must be construed narrowly in favor of aliens. See Fong Haw Tan v. Phelan, 333 U.S. 6 (1948). ("Matters of doubt should be resolved in the favor of the alien.") It is this Court's understanding from its reading of the legislative history that Congress did not intend,

by either the plain language or the legislative history, for this term to apply to Orders to Show Cause issued before the effective date of the Act unless the Attorney General has made an election. However, if the Court had any doubt about this, it would resolve it in favor of the alien and not construe this term to apply to make her ineligible for relief in this particular case.

There has been no issue that the respondent has been physically present in the United States for a continuous period of at least seven years prior to her renewed application for suspension filed in her motion to reopen. In addition to the respondent's uncontradicted testimony on this issue, she has offered some documents and the uncontradicted testimony of her daughter. The Immigration and Naturalization Service has not taken issue with respect to this factual issue and only argues that legally continuous physical presence has been cut off by the issuance of the Order to Show Cause. The Court does find that the respondent has established continuous physical presence as a factual and legal matter in this case.

The "good moral character" requirement of Section 244(a)(1), to be established by the respondent, is described in Section 101(f) of the Act. Under this Section, persons in certain enumerated classes are statutorily ineligible to establish "good moral character" for the preceding seven year period. The fact that any person is not within any of the enumerated classes does not preclude a finding that, for other reasons, such person is not of good moral character. There has been no evidence that the respondent in this case falls within any of those particular classes. The respondent has shown numerous documents and testimony in her case that she is of good moral character. See Exhibits 3 and 4. More specifically, the respondent has recently submitted information that she qualified for a program and that part of that program was to go through numerous background checks by the Florida State Human Resources Services. See Exhibit 4, Tab K. The Court finds that the respondent is a person of good moral character.

The respondent must establish the "extreme hardship" requirements of Section 244(a). In determining whether deportation would cause an alien to suffer "extreme hardship," the following factors, among others, are taken into consideration: age of the subject; family ties in the United States and abroad; length of residence; conditions of health; conditions in the country to which the alien is returnable; financial status; the possibility of other means of adjustment of status; whether or not of special assistance to the United States community; Immigration history; and position in the community. See Matter of Anderson, 16 I&N Dec. 596 (BIA 1978) and Matter of O-J-O-, Int. Dec. 3280 (BIA 1996). In

support of the extreme hardship requirement, the respondent has offered her own testimony and the testimony of her daughter, as well as the numerous exhibits. I have observed the testimony and demeanor of both the respondent and her daughter and find their testimony to be credible and worthy of belief. In assessing the factors under Matter of Anderson and Matter of O-J-O-, I do find that the respondent has established extreme hardship in this case. In this particular case, the respondent's age has really not been a significant factor. She is age 45 and has entered the United States at age 38. Similarly, her length of residence has not been a significant factor since she has just established the minimal residence for suspension of deportation. She's presented n(evidence that her health is to be considered of any factor in this case. In addition, there has been no evidence with respect to any possibility of other means of adjustment of status.

In finding that the respondent has established extreme hardship, the Court has considered first and foremost the special assistance that she has rendered to the United States in the community and her position in the community. The Court has also considered her family ties in the United States. The Court has also considered the information about the economic and political conditions in the country to which she is returnable, as well as her financial status in the United States. Considering all these factors in the aggregate, the Court finds that the respondent has established extreme hardship to herself if she were to be deported.

With respect to community assistance, the respondent has presented a very impressive record. The community assistance that she has provided in the United States has been from the date of her first entry in the United States. She has presented her testimony and the testimony of her daughter that she was involved in various community work in California. Most recently, in Florida, she is involved actively in several community service programs and individual efforts. She has presented documentation, as well as her testimony, to show that she has been an active volunteer on behalf of the Town of Davie. The letter written by the Special Programs Coordinator states that she has known the respondent for over two years and that the respondent has "proven herself to be an asset to their community by donating hundreds of community service hours to the town of Davie." The letter goes on to speak glowingly about the respondent and her family. The Court also notes that the respondent has submitted various letters, as well as a petition by various members of the Davie Women's Club. All of these express that the respondent has given her time freely and willingly to the Davie Women's Club in all of their activities. The respondent has also presented

information that she has recently joined in a program called Special Friends. In this program, she was apparently paired with an adult with developmental disabilities to provide them with an exclusive friend of their own. The respondent has submitted a letter with respect to her participation in this program and has testified that she is involved in this program on a weekly basis. In addition, the respondent has provided information with respect to her activities in running a radio program. Certainly, she receives profit from running this radio program. However, as a part of this program, time has been donated on the program for various community service slots. In addition, the program has been involved in fundraising activities, most recently for an individual who needed funds for a kidney transplant. Considering the enormous amount of community work this individual has done in the United States, she certainly has proven herself to be an asset to the United States community.

The Court has considered various information with respect to the respondent that has shown that she has assimilated into the United States community. She has received a high school diploma as of December of 1993. She also has been involved in the community activities, as mentioned previously, and through her radio program.

The respondent has also presented evidence of property in the United States. she has recently purchased a house in the United States.

One of the more important factors in this case has been the respondent has shown immediate family in the United States. She has shown that she has a very close relationship with her husband and her daughter. Her husband and daughter's status in the United States at the current time appears to be illegal. However, they both have substantial time in the United States, and they may be able to pursue some forms of relief from deportation if they are brought before the Court. The respondent's daughter is in college and working toward a lifelong dream of becoming a doctor in the United States. The closeness of the respondent's ties to her family in the United States and her work with her daughter toward helping her daughter realize her dream of becoming a doctor in the United States, put her in a situation somewhat different from most aliens who would be deportable from the United States. All of these factors, especially considered together, seem to put her in such a different situation.

In addition, the Court has noted the financial status of the respondent in the United States, as well as the economic and political conditions in the country to which she is returnable. The respondent has testified that since she has been in the United States, she has become a producer for a

radio program which has been very successful in the United States. That is certainly not a negative factor and certainly the Court considers it as a positive factor in her case. The Court did note that the State Department Country Reports on Human Rights Practices for 1995 says in Malaysia the government has restricted freedom of expression and media organization and individuals. In addition, the State Department states "women are represented in growing numbers in the professions, although their participation as of 1990 in the administrative and managerial occupations was less than 1% and they generally receive lower wages." With this background, the Court believes that there would be some hardship over and above that of the normal individual if the respondent were deported from the United States. In Malaysia, she was a housewife, dependent on her husband's income. Her husband is now presently in the United States and the family is dependent, in part, on her efforts with the radio station. She has shown information that the government generally is more restrictive with radio stations in Malaysia, and there are very few women, apparently, in any type of administrative or managerial professions in Malaysia. It appears that she would have great difficulty if she were to try to enter the same type of business in Malaysia. The respondent is not a professional and that appears to be the only group, according to the State Department, where women do not seem to be having as much problem with respect to employment opportunities in Malaysia. Again, the Court has considered this in combination with the other factors in this case to show that this respondent would be subject to extreme hardship if she were to be deported from the United States.

In addition, the respondent must show that she merits the relief as a matter of discretion. Considering all of the factors above, the Court believes that she does merit said relief. The only negatives pointed out by the Immigration Service were the fact that she had no qualifying members in the United States and that she was profiting from a radio station. The lack of positive factors with respect to hardship is certainly not a negative. The Board recently stated in Matter of O-J-O- that a respondent with relatively weak family ties in the United States was not precluded from demonstrating extreme hardship for other factors. In this particular case, the respondent has made an overwhelming showing on certain factors, most specifically community service, and when they are taken in conjunction with the other factors, she has shown extreme hardship. The fact that she did not show, for example, poor health or the qualifying family member, certainly is not a negative factor in her case. The Court does not believe there

are any negative factors with respect to discretion in this case and will grant the application.

Accordingly, the following order will be entered.

ORDER

WHEREFOR, IT IS ORDERED, respondent's application for suspension of deportation will be granted.

WHEREFOR, IT IS ORDERED, that respondent's status shall be adjusted to that of lawful permanent resident in the United States.

WHEREFOR, IT IS ORDERED, that the instant proceedings shall be terminated.

DENISE NOONAN SLAVIN
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE DENISE NOONAN SLAVIN, in the matter of:

SUBALECTHUMY VENGADASALAM

A 72 031 574

Miami, Florida

is in accurate, verbatim transcript of the cassette tape as provided by the Executive office for Immigration Review and that this is the original transcript thereof for the file of the Executive office for Immigration Review.

Denise R. Parsley, Transcriber
Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

February 28, 1999
(Completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of proceeding shown in the above paragraph.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF:

VENGADASALAM, Subalechtumy

A#72-031-574

MIAMI DISTRICT

In Deportation Proceedings

SUPPLEMENT TO SERVICE'S BRIEF IN SUPPORT OF ITS APPEAL FROM THE DECISION OF THE IMMIGRATION JUDGE

APPELLANT
THE IMMIGRATION AND NATURALIZATION SERVICE

David Landau
Assistant District Counsel
Immigration and Naturalization Service
155 South Miami Avenue,
5th Floor
Miami, FL 33130

COMES NOW the Immigration and Naturalization Service ("Service"), appearing through its undersigned attorney, requests that the Board of Immigration Appeals ("Board") reverse the Immigration Judge's decision granting the Respondent suspension of deportation and order the Respondent deported to Malaysia, and for cause states as follows:

1. The Service reaffirms its position as set forth in its Brief in Support of its Appeal ("Brief"), dated April 2, 1997, and incorporates that Brief, by reference, herein.

2. Since the Service submitted its Brief, the Board has addressed the issue presented in this matter.

3. The Board held that for purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the issuance of the Order to Show Cause ("OSC") and Notice of Hearing, irrespective of the date it was issued. In Re Nolasco, Interim Decision 3385 (BIA 1999); see also, In re: Mendoza-Sandino, Interim Decision 3426 (BIA 2000) (reaffirming the Board's holding in Nolasco).

4. The Respondent in this matter is one of the named class members in Tefel v. Reno, 180 F.3d 1286 (11th Cir. 1999). The class members had challenged the rule that, for purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the issuance of the OSC. the Service had been enjoined from enforcing this rule. Tefel v. Reno, 972 F.Supp 623 (S.D.Fla., June 24, 1997). On appeal this injunction was vacated. Tefel v. Reno, 180 F.3d 1286 (11th Cir. 1999).

5. Section 309(c) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 provides the Attorney General with the authority to convert, on a discretionary basis, certain deportation or exclusive cases into removal cases. This process, called "repapering," involves termination of the OSC that placed the alien into proceedings, followed by the issuance of a Notice to Appear, placing the alien into new removal proceedings. Regulations for this process have not yet been promulgated. Until such regulations are published, liens who are eligible for repapering may ask that their case be administratively closed.

Repapering may enable an alien to obtain the necessary period of physical presence to be eligible for cancellation of removal pursuant to section 240A(b) of the Immigration and Nationality Act ("Act"). Only aliens who are otherwise prima facie eligible for cancellation of removal will be eligible for such repapering. a review of the Respondent's file and the Service's computer bases indicates that she does not have a qualifying relative, as is required by section 240A(b)(1)(D) of the Act, to establish prima facie eligibility for cancellation of removal. As the Respondent does not appear to be prima facie eligible for cancellation of removal, she is not eligible for discretionary repapering of her case.

Respectfully submitted,

David Landau
Assistant District Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by US Mail this 1st day of March, 2000 to:

Clark Trainor, Esq.
2907 Coral Shores Drive
Fort Lauderdale, FL 33306

David Landau
Assistant District Counsel

72-031-574

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF:

VENGADASALAM, Subalechtumy

A#72-031-574

MIAMI DISTRICT

In Deportation Proceedings

SUPPLEMENT TO SERVICE'S BRIEF IN SUPPORT OF ITS APPEAL FROM THE DECISION OF THE IMMIGRATION JUDGE

APPELLANT
THE IMMIGRATION AND NATURALIZATION SERVICE

David Landau
Assistant District Counsel
Immigration and Naturalization Service
155 South Miami Avenue,
5th Floor
Miami, FL 33130

COMES NOW the Immigration and Naturalization Service ("Service"), appearing through its undersigned attorney, requests that the Board of Immigration Appeals reverse the Immigration Judge's decision granting the Respondent suspension of deportation and order the Respondent deported to Malaysia, and for cause states as follows:

1. The Service reaffirms its position as set forth in its Brief in Support of its Appeal ("Brief"), dated April 2, 1997, and incorporates that Brief, by reference, herein.

2. Since the Service submitted its Brief, the Board of Immigration Appeals has addressed the issue presented in this matter.

3. The Board of Immigration Appeals held that for purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the issuance of the Order to Show Cause and Notice of Hearing, irrespective of the date it was issued. In Re Nolasco, Interim Decision 3385 (BIA 1999).

4. The Respondent in this matter is one of the named class members in Tefel v. Reno, 180 F.3d 1286 (11th Cir. 1999). The class members had challenged the rule that, for purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the issuance of the Order to Show Cause and Notice of Hearing. the Service had been enjoined from enforcing this rule. Tefel v. Reno, 972 F.Supp 623 (S.D.Fla., June 24, 1997). On appeal this injunction was vacated. Tefel v. Reno, 180 F.3d 1286 (11th Cir. 1999).

Respectfully submitted,

David Landau
Assistant District Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by US Mail this 8th day of December, 1999 to:

Clark Trainor, Esq.
124 South Miami Avenue
2nd Floor
Miami, FL 33130

David Landau
Assistant District Counsel

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF:	)
VENGADASALAM, Subalechtumy	)
A#72-031-574	)

In Deportation Proceedings

SERVICE'S BRIEF IN SUPPORT OF ITS APPEAL

COMES NOW the Immigration and Naturalization Service ("Service") by and through its undersigned attorney requests that the Board of Immigration Appeals reverse the Immigration Judge's decision granting the Respondent suspension of deportation to Malaysia, and for cause would state as follows:

Statement of the Facts

1. The respondent is a native and citizen Malaysia who entered the United States on April 3, 1989 as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed October 2, 1989. The respondent failed to depart by the designated date and remained in the United States without authorization from the Immigration and Naturalization Service ("the Service"). As a result, an Order to Show Cause ("OSC") was issued and served upon the respondent on February 4, 1993, charging her with deportability pursuant to Section 241(a)(1)(B).
2. At the time of the service of the OSC, the respondent had been physically present in the United States for a period of less than seven years. Service of the OSC was accomplished on February 4, 1993 by personal service. The respondent acknowledged proper service of the OSC at a Master Calendar hearing on August 12, 1993.

3. On November 8, 1996, the Service moved to pretermit the respondent's suspension of deportation application for lack of statutory eligibility under the various sections of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The Immigration Judge denied the Service's motion and granted the respondent suspension of deportation.

4. The Service reserved appeal and filed a timely Notice of Appeal.

Legal Analysis

5. The Immigration Judge erred and acted in contradiction to the law when she denied the Service's motion to pretermit and granted the respondent suspension of deportation. On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), was signed into law. Section 240A of the Immigration and Nationality Act, created by § 304(a)(3) of the IIRIRA, replaces the former § 212(c) waiver and the former § 244(a) suspension of deportation provisions.[1] Both previous forms of relief are merged into a provision entitled "Cancellation of Removal; adjustment of Status," and provides for the cancellation of removal for certain permanent residents and certain nonpermanent residents. It is the successor statute to § 212(c) and § 244 (suspension of deportation). Section 308(a)(7) of IIRIRA repealed § 244 of the INA and replaces it with provisions in the new § 240A of the INA.

5. Section § 240A(d) of IIRIRA contains rules regarding continuous or physical presence, and provides, in part, in § 240A(d)(1), "for purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense . . ., whichever is earliest."

6. Section 309 of IIRIRA, entitled "Effective Dates' Transition," provides, in pertinent part at 309(c)(5):

> Transitional Rule with Regard to Suspension of Deportation. - Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall

---

[1]Section 212(c) of the INA, 8 U.S.C. 1182(c); Section 244(a)(b)(c) and (d) of the INA, 8 U.S.C. 1254(a)(b)(c) and (d).

> apply to notices to appear ***issued before,*** on, or after the date of the enactment of this Act [emphasis added].

These are transitional rules until the new cancellation provisions take effect April 1, 1997. Section 309(c) provides "Transitional Rules With Regard to Suspension of Deportation." These rules provide, generally, that persons in proceedings before April 1, 1997, shall continue to be considered under the substantive and procedural rules in effect before the IIRIRA was enacted, but with the exceptions provided in the latter paragraphs of § 309(c). One of those exceptions is § 309(c)(5) quoted above, which provides that the new termination of continuous presence rules and the treatment of certain breaks in presence rules contained in § 240A(d)(1) and (2) shall apply to notices to appear issued before, on, or after the date of enactment of the IIRIRA.

7. At the time the Service filed its Notice of Appeal, the Board had not yet issued a decision on the applicability of IIRIRA section 309(c)(5) to pending cases. However, on February 20, 1997, the Board of Immigration Appeals ruled on the issues of the applicability of IIRIRA § 309(c)(5) to pending cases, as well as the meaning of the term "notice to appear." In Re –J-B, Interim Decision #3309 (BIA 1997). The BIA held that under the provisions of the IIRIRA transition rule, service of the Order to Show Cause ends the period of continuous physical presence prior to the acquisition of the requisite seven years.

8. In the instant case, service of the OSC occurred prior to the respondent's acquisition of seven years continuous physical presence in the United States. She was, therefore, ineligible to obtain suspension of deportation. In view of this, the Immigration Judge erred in denying the Service's motion to pretermit and in granting the respondent suspension of deportation. As the Board of Immigration Appeals has issued a precedent decision which establishes the requisite physical presence, the Service does not address the separate issues of good moral character and extreme hardship in its brief.

WHEREFORE, PREMISES CONSIDERED, the Service respectfully requests that the Board of Immigration Appeals reverse the Immigration Judge's decision, pretemit the respondent's application for suspension of deportation and

order the respondent deported to Malaysia, pursuant to In Re N-J-B.

Respectfully submitted,

Sandra Czaykowsky
Assistant District Counsel
Immigration & Naturalization Service
155 South Miami Ave., 5th Fl.
Miami, FL 33130

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this motion was served upon the Respondent's counsel on this 2 day of April, 1997 at the following address:

Clark Trainer, Esq.
124 S. Miami, Ave., 2nd Floor
Miami, FL 33130

Sandra Czaykowsky
Assistant District Counsel
Immigration & Naturalization Service
155 South Miami Ave. 5th Fl.
Miami, FL 33130

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

OMB#1105-0065
Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge

1. List Name(s) and "A" Number(s) of all Applicant(s)/Respondent(s):

   Subalecthumy Vengadasalam
   A72-031-574

WARNING TO ALL APPLICANT(S)/RESPONDENT(S): Names and "A" Numbers of everyone appealing the order must be written in Item #1.

2. Applicant/Respondent is currently
   ❑DETAINED ❑ NOT DETAINED.

3. Appeal from the Immigration Judge's decision dated 11/8/96.

4. **State in detail the reason(s) for this appeal. You are not limited to the space provided below; use more sheets of paper if necessary; Write your name(s) and "A" number(s) on every sheet.**

WARNING: The failure to specify the factual or legal basis for the appeal may lead to summary dismissal without further notice, unless you give specific details in a timely, separate written brief or statement filed with the Board.

PLEASE SEE ATTACHED PAGE

(Attach more sheets if necessary)

5. I ❑do ❑ do not desire oral argument before the Board of Immigration Appeals.

6. I ❑ will ❑ will not file a separate written brief or statement in addition to the "Reason(s) for Appeal" written above or accompanying this form.

WARNING: Your appeal may be summarily dismissed if you indicate in Item #6 that you will file a separate written brief or statement and, within the time set for filing, you fail to file the brief or statement and do not reasonably explain such failure.

SIGN HERE 7. X_____
Signature of person Appealing (*Or attorney or representative*)

11/29/96
Date

8.

Mailing Address of Applicant(s)/Respondent(s)
Sublecthumy Vengadasalam c/o Clark Trainor, Esq.
(Name)
124 S. Miami Ave.
(Street Address)
2nd Floor
(Apartment or Room Number)
Miami, FL 33130
(City, State, Zip Code)

9.

Mailing Address of Attorney or Representative
Sandra Czaykowsky, ADC INS
(Name)
155 S. Miami Ave.
(Street Address)
5th Floor, Litigation
(Apartment or Room Number)
Miami, FL 33130
(City, State, Zip Code)

WARNING: An attorney or representative will not be recognized as counsel on appeal and will not receive documents or correspondence in connection with the appeal, unless he/she submits a completed Form EOIR-27.

CERTIFICATE OF SERVICE
(Must Be Completed)

10.

I, Sandra Czaykowsky, mailed or delivered a copy of this notice of appeal on 11/29/96 to Clark Trainor, Esq. at 124 S. Miami Ave., 2nd Fl., Miami, FL 33130.

SIGN HERE X_____

Signature of Person Appealing (*or attorney or representative)*

Have You?

❑ Read all of the General Instructions
❑ Provided all of the requested information
❑ Completed this form in English
❑ Provided a certificate English translation for all non-English attachments
❑ Signed the form
❑ Served a copy of this form and all attachments on the opposing party
❑ Completed and signed the Certificate of Service
❑ Attached the required fee or fee waiver request

Subalecthumy Vengadasalam
A72-031-574

ATTACHMENT TO FORM EOIR-26

1. The Immigration Judge erred as a matter of law in denying the Immigration and Naturalization Service's (hereinafter "Service") written Motion to Pretermit Application for Suspension of Deportation. on October 1, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRAIRA") was signed into law. Section 240A of the Immigration and Nationality Act was created by Section 304(a)(3) of the IIRAIRA. it is entitled "Cancellation of Removal; Adjustment of Status." It is the successor statute to section 212(c) and suspension of deportation.

Pursuant to Section 240A(d)(1) of the INA, "for purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense . . ., whichever is earliest."

By Stipulation, it is undisputed that the Respondent entered the United States April 3, 1989. Respondent's Order to Show Cause (OSC) was issued and properly served on her, on February 4, 1993. At the time of the Service of the OSC, the Respondent had been physically present in the United States for less than seven years.

The Respondent's continuous physical presence in the U.S. terminated with the service of the OSC, upon her. Section 309(c)(5) of the IIRAIRA provides as follows:

> TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION. - Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on or after the date of the enactment of this Act.

As Section 309(c)(5) has provided for retroactive application of the continuous physical presence requirement, the Respondent is statutorily precluded form establishing the requisite time period in order to be eligible for suspension of deportation.

2. Before a motion or any form of discretionary relief may be granted, an alien must first establish statutory eligibility therefor; only then does the issue of proper exercise of discretion present itself. INS v. Abudu, 485 U.S. 94 (1988). See also Matter of Pena-Diaz, Int. Dec. 3225 (BIA August 4, 1994). In the instant case, Respondent was NOT statutorily eligible to apply for suspension of deportation. Therefore, the immigration judge had no discretionary authority to exercise. Compliance with IIRAIRA is statutory, not discretionary.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

IN THE MATTER OF:

SUBALECHTUMY VENGADASALAM
RESPONDENT

A#72-031-574

IN DEPORTATION PROCEEDINGS

ORDER

A Motion TO RECONSIDER BY THE IMMIGRATION AND NATURALIZATION SERVICE HAS BEEN FILED IN THE ABOVE CAPTIONED CASE. THE Motion has been duly considered and it appears to the Court that:

( ) The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be GRANTED.

(✓) No substantial grounds have been advanced to warrant its grant. Therefore, IT HEREBY IS ORDERED that the Motion be DENIED.

(✓) The Court notes the INS was unopposed to the motion to reopen, as represented by the parties on June 18, 1996. Further, the Court finds that the Court's failure to act within time voluntary departure period was on exceptional circumstance beyond the control of Respondent.

DONE AND ORDERED this 18th day of June, 1996, at Miami, Florida.

DENISE N. SLAVIN
U.S. Immigration Judge

cc: District Counsel
Counsel for Respondent/Applicant
Respondent/Applicant

MAILED OUT 6/19/96 by TAT

000381

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

IN THE MATTER OF:

SUBALECHTUMY VENGADASALAM
RESPONDENT A#72-031-574

IN DEPORTATION PROCEEDINGS

ORDER

A Motion TO REOPEN HAS BEEN FILED IN THE ABOVE CAPTIONED CASE. THE Motion has been duly considered and it appears to the Court that:

(✓) The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be GRANTED.

() No substantial grounds have been advanced to warrant its grant. Therefore, IT HEREBY IS ORDERED that the Motion be DENIED.

(✓) Motion is unopposed under 8 C.F.R. § 3.23(a) since no timely response was made.

DONE AND ORDERED this 2nd day of May, 1996, at Miami, Florida.

DENISE N. SLAVIN
U.S. Immigration Judge

cc: District Counsel
Counsel for Respondent/Applicant
Respondent/Applicant

MAILED OUT 5/3/96 by TAT 000400